Gee Siew Yee v Ann Wam Tiang

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–02–434 OF 2006
GOPAL SRI RAM, MOHD GHAZALI AND RAUS SHARIF JJCA
20 NOVEMBER 2007

Civil Procedure — Consent order — Variation — Objections to variation by defendant — Subject matter to the consent order was no longer in existence — Whether consent order ought to be varied

The defendant appealed against the decision of the high court in allowing the plaintiff's application to modify or vary a consent order recorded on 15 January 2003 ('consent order') and for a further order for the defendant to deposit within 14 days, a sum of RM715,000 with interest thereon into court as well as other consequential orders. The plaintiff's application was based on the premise that the intention of the parties when consenting to the consent order was that there would be no dealings or transactions whatsoever by the defendant in respect of the SunCon shares until final disposal of the suit. However, on 31 May 2004, pursuant to a take over exercise, the SunCon shares were acquired by Sunway Holdings Incorporated Berhad ('SunInc'). On 20 July 2004, the SunCon shares that were registered in the name of the defendant were converted to SunInc shares. As the result of the corporate exercise, for every one ordinary share in SunCon, the defendant received cash amounting in total to RM715,000 and one ordinary share of RM1 each in SunInc (amounting in total to 650,000 SunInc shares). It was the contention of the plaintiff that the proposed variation of the consent order was merely to reflect the intention of the parties and so that the defendant should not reap unjust enrichment before final disposal of the suit. The defendant in opposing the application basically contended that the court had no jurisdiction to vary the consent order. To the defendant, the consent order was not a judgment per se. It was nothing more than an agreement between the parties, the terms of which have been recorded by the court. In doing so, the court was not exercising its adjudicative function but merely giving due recognition and effect to an agreement between the parties.

Held, dismissing the appeal:

(1) The court was of the view that the consent order was in the nature of an interlocutory order as it did not finally determine the dispute

between the parties in respect of the subject matter in the suit. The court had always had control over interlocutory orders. It may, in its discretion, vary or alter them even though made originally by consent (see *Ooi Siew Yook v Lim Bar Kee* [1987] 2 MLJ 267; *Purcell v FC Trigell Ltd* [1971] 1 QB 358). In exceptional cases, even a consent order which was final and had been perfected, could be set aside in the same action, (see *Marsden v Marsden* [1972] 2 All ER 1162; *Khaw Poh Chuan v Ng Gaik Peng* [1996] 1 MLJ 761) (see para 14).

(2) This was a case where the subject matter to the consent order was no longer in existence. The SunCon shares had been converted into SunInc shares due to a corporate exercise. The 650,000 SunInc shares and cash of RM715,000 were derivative shares and benefits derived from the original 650,000 SunCon shares. The sum of RM715,000 sought to be deposited into court was not from the defendant's own fund but from the take over after the restructuring exercise in respect of the SunCon shares which was the subject matter of the suit. The defendant had in substance agreed pursuant to the consent order that she would not reap personal benefits from the SunCon shares until final adjudication by the court. There was therefore no question of hardship suffered by the defendant from the order sought for her to deposit the sum of RM715,000 into court (see para 15).

[Bahasa Malaysia summary

Defendan merayu terhadap keputusan mahkamah tinggi yang membenarkan permohonan plaintif untuk mengubah atau menukar perintah persetujuan yang direkodkan pada 15 Januari 2003 ('perintah persetujuan') dan untuk perintah selanjutnya bahawa defendan mendepositkan dalam masa 14 hari, jumlah RM715,000 dengan faedah ke mahkamah dan juga perintah-perintah sampingan lain. Permohonan plaintif berdasarkan atas premis bahawa hasrat pihak-pihak apabila menyetujui perintah persetujuan tersebut adalah bahawa sepatutnya tiada urusan atau transaksi langsung berhubungan dengan saham-saham SunCon sehingga penyelesaian tindakan tersebut. Akan tetapi, pada 31 Mei 2004, berikutan satu kegiatan pengambilalihan, saham-saham SunCon telah diambil alih oleh Sunway Holdings Incorporated Berhad ('SunInc'). Pada 20 Julai 2004, saham-saham SunCon yang didaftarkan atas nama defendan telah ditukar kepada saham-saham SunInc. Hasil daripada kegiatan korporat tersebut, untuk setiap saham biasa SunCon, defendan menerima wang berjumlah keseluruhannya sebanyak RM715,000 dan satu saham biasa RM1 sesaham di SunInc (yang berjumlah keseluruhannya kepada 650,000 saham-saham SunInc). Ia adalah penegasan plaintif bahawa pengubahan kepada perintah persetujuan yang dicadangkan tersebut adalah hanya untuk mencerminkan hasrat pihak-pihak dan dengan itu defendan tidak sepatutnya mendapatkan pengayaan yang tidak adil sebelum

penyelesaian tindakan tersebut. Defendan dalam membantah permohonan tersebut menegaskan bahawa mahkamah tiada bidang kuasa untuk mengubah perintah persetujuan tersebut. Kepada defendan, perintah persetujuan tersebut bukannya satu penghakiman per se. Ia tidak melebihi daripada persetujuan di antara pihak-pihak, di mana terma-terma direkodkan oleh mahkamah. Dalam berbuat demikian, mahkamah bukannya menjalankan fungsi adjudikasinya tetapi hanya memberi pengiktirafan dan kesan kepada perjanjian di antara pihak-pihak.

Diputuskan, menolak rayuan:

(1) Mahkamah berpendapat bahawa perintah persetujuan adalah bersifat perintah interlokutori oleh kerana ia tidak memutuskan dengan muktamadnya pertikaian di antara pihak-pihak berhubungan dengan tajuk pokok tindakan tersebut. Mahkamah telah sentiasa mempunyai pengawalan perintah-perintah interlokutori. Ia boleh, mengikut budi bicaranya, mengubah atau menukarkannya, walaupun ia dibuat pada asalnya dengan persetujuan (lihat *Ooi Siew Yook v Lim Bar Kee* [1987] 2 MLJ 267; *Purcell v FC Trigell Ltd* [1971] 1 QB 358). Dalam kes-kes yang luar biasa, walaupun perintah persetujuan adalah muktamad dan telah disempurnakan, masih dapat diketepikan dalam tindakan yang sama, (lihat *Marsden v Marsden* [1972] 2 All ER 1162; *Khaw Poh Chuan v Ng Gaik Peng* [1996] 1 MLJ 761) (lihat perenggan 14).

(2) Ini adalah satu kes di mana tajuk pokok perintah persetujuan tidak lagi wujud. Saham-saham SunCon telah ditukar kepada saham-saham SunInc yang disebabkan dengan kegiatan korporat tersebut. Saham-saham SunInc yang berjumlah 650,000 tersebut dan wang yang berjumlah RM715,000 adalah saham-saham terbitan dan keuntungan-keuntungannya diperolehi daripada saham-saham 650,000 SunCon yang asal. Jumlah RM715,000 yang dituntut untuk didepositkan ke mahkamah bukannya daripada kewangan defendan sendiri tetapi daripada pengambilan-alih selepas kegiatan penstrukturan semula berhubungan dengan saham-saham SunCon yang menjadi tajuk pokok tindakan. Defendan telah bersetuju berikutan dengan perintah persetujuan bahawa beliau tidak akan memperolehi keuntungan-keuntungan peribadi daripada saham-saham SunCon sehingga penyelesaian tindakan oleh mahkamah. Dengan itu tiada kesulitan yang dialami oleh defendan daripada perintah yang memerlukannya mendepositkan jumlah RM715,000 ke mahkamah (lihat perenggan 15).]

Notes

For cases on variation, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1707–1715.

Cases referred to

Khaw Poh Chuan v Ng Gaik Peng [1996] 1 MLJ 761 (folld)
Marsden v Marsden [1972] 2 ALL ER 1162 (folld)
Ooi Siew Yook v Lim Bar Kee [1987] 2 MLJ 267 (folld)
Purcell v FC Trigell Ltd [1971] 1 QB 358 (folld)

Appeal from: Civil Suit No D1–22–581 of 2001 (High Court, Kuala Lumpur)

Shahul Hameed Amirudin (Zul Rafique & Partners)for the appellant.
Ramdas Tikamdas (Lachaman Lalchand & Associates) for the respondent.

Raus Sharif JCA (delivering judgment of the court):

[1] This is an appeal by the defendant against the decision of the High Court in allowing the plaintiff's application to modify or vary the consent order recorded on 15 January 2003 ('consent order') and for a further order for the defendant to deposit within 14 days, a sum of RM715,000 with interest thereon into court as well as other consequential orders.

[2] On 4 April 2007 we heard and dismissed the appeal with costs.

[3] The facts of this case are these. On 17 April 2002, the plaintiff filed a writ and statement of claim against the defendant for the following reliefs:

(a) to restrain the defendant from selling or conducting any dealing or transaction with 650,000 shares in Sunway Construction Berhad ('the SunCon shares') and seeking the return of the same to him forthwith.

(b) alternatively, if the SunCon shares could not be returned to him, the plaintiff prayed that the court enter a judgment in his favour in the sum of RM1,495,000.

[4] The plaintiff in the statement of claim contends that on 3 September 1997, he had loaned the defendant the SunCon shares to be pledged into the defendant's margin account in South Johor Securities Sdn Bhd. The defendant promised to return the SunCon shares to the plaintiff when her margin account reach 170%. The said loan is evidenced by a loan agreement dated 30 June 1998 executed by the defendant and the plaintiff pursuant to which the defendant promised to return the SunCon shares.

[5] After filing the suit, the plaintiff on 24 April 2002, applied by way of an inter-parte summons in chambers for an injunction to restrain the defendant from disposing of the SunCon shares and also for mandatory injunction for the return of the same. On 27 June 2002, the learned High Court judge allowed the prayer for prohibitory injunction restraining the defendant from disposing the SunCon shares.

[6] On 19 September 2002, the defendant filed a summons in chambers to set aside the prohibitory injunction. When the case came up for hearing on 15 January 2003, the parties informed the learned High Court judge that they had reached a compromise. A draft consent order duly signed by counsel for the plaintiff and defendant was tendered and the same was recorded as a consent order. It was agreed as follows:

(i) The plaintiff to withdraw the application for injunction dated 27 June 2002.

(ii) The defendant undertakes not to sell and or transfer the 650 lots of SunCon shares owed by her until the final disposal of the action herein and also undertakes that the said shares shall be free from any encumbrances on the date of final disposal of the suit.

(iii) The plaintiff agrees to pay cost of RM15,000 to the defendant or her solicitors.

(iv) The defendant to be given the right to reply the plaintiff's affidavit dated 3 December 2002 at or before the full trial herein.

[7] On 31 May 2004, pursuant to a take over exercise, the SunCon shares were acquired by Sunway Holdings Incorporated Berhad ('SunInc'). In the exercise, SunInc acquired the ordinary shares of RM1 each of SunCon shares at an offer price of RM2.73 to be satisfied by cash of RM1.10 and one ordinary share of RM1 in SunInc at an issue price of RM1.63 credited as fully paid up for each of the SunCon shares.

[8] On 20 July 2004, the SunCon shares that were registered in the name of the defendant were converted to SunInc shares. As the result of the corporate exercise, for every one ordinary share in SunCon, the defendant received cash of RM1.10 per share (amounting in total to RM715,000) and one ordinary share of RM1 each in SunInc (amounting in total to 650,000 SunInc shares).

[9] Following from the above events, the plaintiff on 6 December 2004 simultaneously filed summons in chambers to amend the writ and statement of claim and summons in chambers to modify and/or vary the consent order. On 25 May 2005, order in terms was granted without objection from the

defendant with regard to the plaintiff's application to amend the writ and statement of claim. However, the plaintiff's application to modify or vary the consent order was resisted by the defendant.

[10] In essence, the proposed variation to the consent order applied for by the plaintiff are:

(i) that the defendant be restrained from selling or transferring and or doing any business or transaction whatsoever in respect of the 650 lots of shares in SunCon and or whatsoever converted shares/warrant and or cash and also, if any dividends paid or to be paid for the shares presently owed by the defendant until final disposal of the suit and also undertakes that the said shares shall be free from all encumbrances on the date of final disposal of the suit.

(ii) that the defendant to deposit the sum of RM715,000 with interest thereon, which is the monies the defendant received for the SunCon shares that the defendant has undertaken to preserve until final disposal of the suit.

[11] The plaintiff's application was based on the premise that the intention of the parties when consenting to the consent order was that there would be no dealings or transactions whatsoever by the defendant in respect of the SunCon shares until final disposal of the suit. The restructuring exercise and conversion of the SunCon shares and cash payment of RM715,000 was never contemplated by either party. Thus, it is the contention of the plaintiff that the proposed variation of the consent order was merely to reflect the intention of the parties and so that the defendant should not reap unjust enrichment before final disposal of the suit.

[12] The defendant in opposing the application basically contended that the court has no jurisdiction to vary the consent order. To the defendant, the consent order is not a judgment per se. It is nothing more than an agreement between the parties, the terms of which have been recorded by the court. In doing so, the court is not exercising its adjudicative function but merely giving due recognition and effect to an agreement between the parties.

[13] The learned High Court judge decided in favour of the plaintiff. Hence, consent order was varied as prayed by the plaintiff. In doing so, the learned High Court judge held as follows:

(i) The consent order is an interlocutory or interim order as it was made pending the final disposal of the suit. Hence, the court is clothed with ample powers, to vary the consent order;

(ii) The 650,000 SunInc shares and cash sum of RM715,000 are derivative shares and benefits derived from the original 650,000 SunCon shares;

(iii) The subject matter of the consent order is no longer in existence and unless it is varied, the consent order, in its original form would remain 'a dead letter';

(iv) The cash payment of RM715,000 constitute unjust enrichment to the defendant.

[14] We are in agreement with the learned High Court judge. It is our respectful view that the consent order is in the nature of an interlocutory order as it does not finally determine the dispute between the parties in respect of the subject matter in the suit. The court has always have control over interlocutory orders. It may, in its discretion, vary or alter them even though made originally by consent, (see *Ooi Siew Yook v Lim Bar Kee* [1987] 2 MLJ 267; *Purcell v FC Trigell Ltd* [1971] 1 QB 358). In exceptional cases, even a consent order which is final and has been perfected, can be set aside in the same action, (see *Marsden v Marsden* [1972] 2 All ER 1162; *Khaw Poh Chuan v Ng Gaik Peng* [1996] 1 MLJ 761).

[15] On the facts of this case, it is our respectful view that the learned High Court judge has rightly exercised his discretion in varying the consent order. This is a case where the subject matter to the consent order is no longer in existence. The SunCon shares has been converted into SunInc shares due to a corporate exercise. The 650,000 SunInc shares and cash of RM715,000 are derivative shares and benefits derived from the original 650,000 SunCon shares. The sum of RM715,000 sought to be deposited into court is not from the defendant's own fund but from the take over after and restructuring exercise in respect of the SunCon shares which is the subject matter of the suit. The defendant had in substance agreed pursuant to the consent order that she would not reap personal benefits from the SunCon shares until final adjudication by the court. There is therefore no question of hardship suffered by the defendant from the order sought for her to deposit the sum of RM715,000 into court.

[16] Thus, the decision of the learned High Court judge is reasonable. The variation of the consent order is to reflect the new scenario which existed after the corporate exercise. It is only by varying the consent order that the undertaking previously given by the defendant under the consent order will maintain its intended effect. Otherwise as rightly pointed out by the learned High Court judge, the consent order in its original form would remain 'a dead letter'.

A **[17]** For the above reasons, we unanimously upheld the decision of the learned High Court judge. We dismissed the appeal and the usual orders consequential on dismissal were made.

Appeal dismissed.

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Reported by Sally Kee

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